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Supreme Court, U. S.
FILED
DEC 18 1980
JOSEPH F. SPANIOL, JR., CLERK

CASE NO. A-326

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

ANNIE GREEN,

Petitioner

vs.

JOHN H. ACKERMAN, M.D., M.P.H.,
DIRECTOR OF HEALTH, et al.,

Respondent

ANNIE GREEN,

Petitioner

vs.

BOARD OF EXAMINERS OF
NURSING HOME ADMINISTRATORS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE FRANKLIN COUNTY COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DID THE STATE LICENSING AGENCIES VIOLATE THE CONSTITUTIONAL RIGHTS OF AN ELDERLY BLACK WOMAN WHO WAS A PRACTICING ADMINISTRATOR BEFORE THE ADOPTION OF A STATE LICENSING LAW UNDER THE 5TH AND 14TH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES WHEN THEY REQUIRED HER TO PASS AN EXAMINATION TO PERMIT HER TO CONTINUE IN HER OCCUPATION WHICH TEST AN EXPERT TESTIFIED WAS DESIGNED IN SUCH A FASHION THAT IT DISCRIMINATED AGAINST PERSONS OF HER AGE AND RACE WITHOUT JUSTIFICATION OR BENEFIT TO PATIENTS OR THE PUBLIC?

PARTIES

The petitioner in this action is Annie M. Green, age 77, licensed nursing home operator, and applicant for a nursing home administrator's license. The respondents are the Ohio Department of Health, Board of Examiners of Nursing Home Administrators and Dr. John H. Ackerman, Director of Health, State of Ohio. The Board of Examiners is the agency that denied petitioner her administrator's license, and Dr. John H. Ackerman is the administrator who proposed to revoke her nursing home license for failure to have an administrator's license.

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DECISIONS BELOW

The decision of the Court of Common Pleas of Franklin County, Ohio, Case Numbers 77CV-11-4977 and 77CV-04-1664, dated December 28, 1978, is unreported. (A.VII) The decision of the Court of Appeals of Franklin County, Ohio, Tenth Appellate District, Case Numbers 79AP-236 and 79AP-237, dated October 4, 1979, is unreported. (A.V)

JURISDICTION

The Supreme Court of the State of Ohio, the highest court in the State of Ohio in which a decision could be had, rendered a final judgment in the above entitled case by overruling petitioner's motion for reconsideration of its decision dismissing the appeal as being improvidently granted on June 20, 1980, and on July 24, 1980, overruled petitioner's timely filed motion for reconsideration.

On October 16, 1980, this Court entered its Order Extending Time to File Petition for Writ of Certiorari by extending such time period to and including December 22, 1980.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3). Petitioner is claiming that rights, privileges and immunities guaranteed to the petitioner under the 5th and 14th Amendments to the

Constitution of the United States were abridged and violated by action of the State.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment V to the Constitution of the United States providing that no persons shall be deprived of life, liberty or property without due process of law:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or in public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1, which provides no person shall be denied equal protection of the laws:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

> state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

made applicable to the states by Sections 1 and 5 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Section 4751.06(B)&(C), Ohio Revised Code, 133 Ohio Laws 1385-86:

(B) THE BOARD SHALL ISSUE A PROVISIONAL LICENSE TO ANY INDIVIDUAL APPLYING THEREFORE WHO MEETS THE WAIVER REQUIREMENTS SET FORTH IN THE SOCIAL SECURITY AMENDMENTS OF 1967, 81 STAT. 909, (1968) 42 U.S.C. 1396 G (D), OR AS SUCH WAIVER REQUIREMENTS MAY BE AMENDED, AND MEETS THE STANDARDS OF THE BOARD RELATING TO GOOD CHARACTER, SUITABILITY, AGE, AND CITIZENSHIP.

(C) SUCH PROVISIONAL LICENSE SHALL, SUBJECT TO PAYMENT OF THE ANNUAL FEE, REMAIN IN EFFECT FOR SUCH PERIOD OF TIME AS WAIVER FROM EXAMINATION IS PERMITTED BY THE SOCIAL SECURITY AMENDMENTS OF 1967, 81 STAT. 909 (1969) 42 U.S.C. 1396 G (D), OR AS HEREAFTER AMENDED, WHEN SUCH PROVISIONAL NURSING HOME ADMINISTRATOR HAS PASSED A QUALIFYING EXAMINATION AS REQUIRED BY THE BOARD, A NURSING HOME ADMINISTRATOR LICENSE SHALL BE ISSUED TO HIM.

STATEMENT OF THE CASE

The Ohio Legislature on April 2, 1970 passed Amended Senate Bill No. 481, 133 Ohio L. 1380, adopting a comprehensive licensing law for nursing home administrators, Chapter 4751, Ohio Revised Code.

Section 4751.06(B) and (C) of the new law, 133 Ohio Laws 1385-86 provided for the issuance of provisional license and subparagraph (C) provided that the provisional licensee, after the waiver period, might be issued a license after passing a qualifying examination required by the Board.

The petitioner, Annie Green, a nursing home operator in Franklin County since May 13, 1947, applied for and obtained a provisional license. The Nursing Home Administrator's Licensing Board issued Mrs. Green a license and forwarded to her a certificate on September 7, 1970. Mrs. Green was licensed by the Ohio Department of Health to operate a nursing home known as The Christian Home for the Aged, 1454 Eastwood Avenue, Columbus, Ohio.

In 1972 the Nursing Home Administrator's Licensing Board notified Mrs. Green that pursuant to her application filed October 4, 1971, she could take the licensing exam on May 18, 1972. Mrs. Green took the examination, and on August 22, 1972, the Board advised her that she had failed the examination and that she was violating the law by not having a licensed administrator in her home. Mrs. Green engaged counsel, and on December 27, 1972 demanded a hearing pursuant to

Chapter 119, Ohio Revised Code, to contest the denial of her permanent license.

On February 16, 1973 the Board of Examiners of Nursing Home Administrators granted Mrs. Green a hearing, and after full hearing, issued an order denying her appeal.

Annie Green appealed the decision of the Board of Examiners to the Court of Common Pleas of Franklin County, Ohio, in Case Number 73CV-03-1104. Judge William Gillie, on September 17, 1976, overruled the appeal and affirmed the ruling of the Nursing Home Administrator's Licensing Board. The case was appealed to the Court of Appeals of Franklin County, Ohio, in Case Number 76AP-825. The Court of Appeals reversed the trial court's decision and remanded the matter to the Nursing Home Administrator's Licensing Board so that the Board might enter an appealable order.

Counsel for Mrs. Green requested a rehearing before the Nursing Home Licensing Board to renew and reargue Mrs. Green's position. The agency, in response to the request, issued a finding and adjudication order, and the matter was then appealed to the Court of Common Pleas of Franklin County, Ohio, in Case Number 77CV-11-4977, wherein Mrs. Green renewed her attack on the constitutionality of the licensing procedure utilized by the Board. Case Number 77CV-11-4977 was consolidated with Case Number 77CV-04-1664, which was Mrs. Green's appeal from an

action of the Director of Health proposing to revoke her nursing home license based on the ground that she did not have a licensed administrator and six other grounds.

On July 2, 1975 the Director of Health issued an order proposing to revoke Annie Green's nursing home license on seven grounds including the failure to have a licensed administrator as provided by law. Mrs. Green demanded and was given a hearing on June 2, 1976 before a hearing officer appointed by the Director of Health. The Referee dismissed five of the alleged violations and sustained the proposed revocation on the basis that Mrs. Green did not have a licensed administrator in her home and that she had cared for more than the seventeen patients for which she was licensed.

Petitioner appealed from the Director's order of April 6, 1977 to the Court of Common Pleas of Franklin County, Ohio, in Case Number 77CV-04-1664. Mrs. Green moved to consolidate these two cases as indicated above, and the motion was granted because of the identical issues.

Mrs. Green, upon consolidation, made a motion pursuant to Section 119.12, Revised Code, to offer further evidence to support the contention that the testing procedure and exam utilized by the Nursing Home Administrator's Licensing Board was unconstitutional in that the test discriminated against her on the basis of age and sex without benefit or justification. The petitioner called an expert witness, a psycho-

metrician, Dr. JeD-Costa, who had worked on the development of medical school admission tests and other similar examinations, and he testified that the test was defectively designed by the testing agency from whom the state purchased the test. He stated that the test discriminated against Annie Green based upon age and race and that the testing agency had to know this would be the result of using the exam.

The trial court found the test procedures discriminated against Annie Green on the basis of color and age and that there was a procedural error in regard to the reduction of Mrs. Green's nursing home capacity. (A.VII)

The State filed a notice of appeal in both cases to the Court of Appeals of Franklin County, Ohio, being Case Numbers 79AP-236 and 79AP-237. The two cases were, upon motion, consolidated for briefing and argument. The Court of Appeals, after full argument, reversed the trial court in part and sustained the trial court in part. (A.V)

The Court of Appeals held that the trial court improperly found there was a purposeful discrimination and ruled that the disproportionate impact against persons of Annie Green's age and race was insufficient to invalidate the action of the Board in requiring Annie Green to pass the examination.

The Court of Appeals ruled that the trial court erred in finding the test and testing procedures to be unconstitutional and remanded the case for further trial on procedural aspects not considered by the trial court.

Mrs. Green filed a notice of appeal to the Supreme Court of Ohio in both cases, and on February 8, 1980, the Supreme Court of Ohio accepted the appeal and ordered the Court of Appeals of Franklin County, Ohio, to certify the record in both cases.

The record was prepared and filed in the Supreme Court of Ohio as provided by law, and the cases were fully briefed and orally argued before the court on the 21st day of May, 1980. The Supreme Court of Ohio, after full argument on June 18, 1980, issued an order dismissing the appeals as improvidently allowed.

A motion for rehearing was filed within rule and the Supreme Court of Ohio on the 24th day of July, 1980, overruled the motion for rehearing.

The plaintiff filed a motion to enlarge time in the Supreme Court of the United States on the 8th day of October, 1980, and the motion was granted on October 16, 1980 extending the time for filing a petition for writ of certiorari to and including December 22, 1980.

The petitioner seeks review of the decisions outlined in this petition for writ of certiorari.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

A. The State Court Decided An Important Federal Question Which Has Not Been Settled By This Court.

Annie M. Green was born March 19, 1903, and on May 18, 1972, was sixty-nine years old. Annie Green is a black business woman who has operated a nursing home business in Columbus, Ohio, pursuant to license, since 1947. Mrs. Green was and is a licensed practical nurse. Mrs. Green has a high school education and did attend classes at the Ohio State University in the 1920's. The application of Mrs. Green filed with the Administrator's Licensing Board to obtain a permanent license indicated she was honest, frugal, and well able to run her small business. The Licensing Agency, acting pursuant to their regulations, required Mrs. Green to take and pass the same test given to students who were freshly educated, and who were much younger and who were educated to take the test for their initial license.

Mrs. Green had a small facility, and because of her age and the press of business, vigorously opposed the taking of the test. However, Mrs. Green took the examination and was informed by the agency that she had failed the examination. She then obtained counsel and began her attack on the constitutionality and legality of the Board's action requiring elderly black applicants to pass a test devised for freshly educated, younger, first-time applicants.

Mrs. Green, at the trial of the consolidated case in the Court of Common Pleas of Franklin County, Ohio, presented the testimony of Dr. JeD-Costa, an expert in the psychology development and administration of examinations. Dr. JeD-Costa, a psychometrician, testified based upon accepted testing principles and guidelines and upon his training and experience, the examination discriminated against Mrs. Green based upon race and age. He testified that the test was not properly designed or administered to prevent discrimination and that the experts who devised the examination for the Ohio Department of Health should have realized this.

The examination was developed by an outside testing service, Professional Examination Service, without regard to Ohio law or by virtue of input by the Nursing Home Administrator's Licensing Board. The test was purchased and administered without consideration of Ohio statutes or regulations. It was developed for use elsewhere prior to the adoption of the Ohio law. Judge Shoemaker of the Franklin County Common Pleas Court correctly ruled that the test discriminated against Annie Green, and that the agency knew or should have known that the examination would discriminate against older black citizens.

The petitioner contends:

1.) The test purchased and utilized by the Ohio Board of Nursing Home Administrators was defectively designed and administered so that it discriminated

against elderly black applicants who had been engaged in the nursing home administration field prior to the adoption of the law requiring licensure, and that the discrimination resulting therefrom violates the 5th and 14th Amendments to the Constitution of the United States of America by denying Annie Green due process and equal protection under the law.

2.) Age is an area clearly protected by the equal protection clause of the United States which should be clearly encompassed in the same classification and category as sex and race.

3.) There is or should be no requirement that the court find that the agency purposely discriminated against a citizen in order to strike down the use of a test which they knew or should have known would discriminate based upon age and race without demonstrating that the test was necessary to benefit patients.

The Court of Appeals of Franklin County, Ohio, in reversing the decision of the trial court, held that the record in the case did not contain sufficient evidence to support a finding of purposeful discrimination, since the only evidence was the alleged disproportionate impact regarding blacks and elderly persons. This is a case in which the State Court decided an important question of federal law which has not been but should be settled by this Court. We feel age is a category which must be considered in the same constitutionally protected areas as race and sex. We believe the court should speak out

firmly and clearly on the issue and state without reservation that state action which discriminates against a citizen because of age without any benefit or protection to the public violates the equal protection clause of the Constitution. The Court should make it clear that where the evidence shows the state's agent knew or should have known the test would discriminate against black, aged applicants without benefit to the public or patients, the test violates the equal protection clause.

The Supreme Court of the United States, in Columbus Board of Education v. Penick (July 2, 1979), 443 U.S. 449, 61 L.Ed. 2d 666, 99 S.Ct. 2941, at page 464, in discussing foreseeability as applied to state action, said of the United States District Court's finding in the Columbus School desegregation case:

> Nevertheless, the District Court correctly noted that actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose.

We believe the findings based upon the evidence are so specific in this regard that it is established without question that the Nursing Home Administrator's Licensing Board selected a test without scrutiny, question or study which discriminates against blacks and elderly persons without justification or benefit, thereby prohibiting Annie Green from continuing in her life's

work. Expert testimony, educational standards and government standards require careful validation to prevent discrimination. The administration of a test that was not devised with these standards in mind or in disregard of such matters, which discriminates against elderly and black applicants effectively eliminates qualified elderly, black administrators and thus violates the equal protection clause.

Courts have clearly held that once the racially adverse impact is demonstrated by evidence, the burden shifts to the employer or, in this case the State, to demonstrate that the test is job related. Scott v. City of Anniston, Ala. (1979), 597 F.2d 897, 901 (5th Cir.). The 9th Circuit, in Blake v. City of Los Angeles, 595 F.2d 1367 (1979), states the principal that validation studies must be employed to insure the likelihood of obtaining trustworthy results to prevent the very thing that happened in this case. The District Court of Maryland, in Vanguard Justice Society v. Hughes, 471 F. Supp. 670, points out at pages 730 to 732 the significance of the failure to properly validate tests to prevent discrimination. The court, at page 735 of its decision, states:

> Mr. Bemis testified (Tr. 92) that the authors of the neighboring jurisdiction study examined Test No. 10 for fairness. Guidelines §§ 15(B)(8). However, no evidence of test fairness, i.e., in this instance, comparison of test scores of

blacks and whites versus their respective job performances, was presented other than Mr. Bemis' stamp of seeming approval upon the conclusion of the psychologists who conducted the study that Test No. 10 was fair. As related supra, the cutoff score on Test No. 10 was 70%. The record fails to reveal the relevance of that cutoff point either to the neighboring jurisdiction or to Baltimore City. See Guidelines §§ 15(B)(10).

In sum, the evidence presented with regard to the neighboring jurisdiction study, both considered separately and together with all other evidence, does not constitute a showing by defendants of the job relatedness of Test No. 10. Accordingly, that test, because of its discriminatory impact, was utilized by defendants in violation of Title VII.

The Third Circuit, in Richardson v. Pennsylvania Department of Health (1977), 561 F.2d 489, in dealing with a civil service exam given to a Laboratory Technician, summarizes the rule regarding proof of purposeful discrimination in Washington v. Davis, 426 U.S. 229, at page 492, as follows:

She is entitled to the opportunity to offer proof that the "bad faith" referred to was an inten-

> tional and purposeful discriminatory intention in using the test. And as Washington v. Davis makes clear, the actual results of an employment selection exam, which according to her complaint were anticipated by the defendants, may be evidence of discriminatory intent. See Village of Arlington Heights v. Metropolitan Housing Devel. Corp., 429 U.S. 252, 264, 97 S.Ct. 555, 50 L.Ed. 2d 450 (1977).

We believe it is clear that the state agency had a duty to develop the test either through the testing agency or through their own personnel so that they followed the standard techniques to prevent a systematic discrimination against elderly, black operators without benefit to the patients or the public. The Court should accept this case and clearly point out to the states that they cannot discriminate against older citizens on the basis of their age when there is no benefit or purpose.

B. Importance Of The Issue.

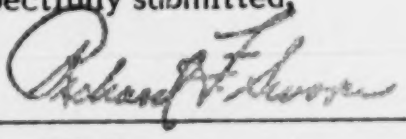
We submit this case is important because it deals with examinations devised by the State to license elderly black people who have spent a lifetime working in their chosen field by using a test that eliminates them without reason or cause because of faulty design and precaution by the developers to prevent exclusion

solely on the basis of age and race when these factors have no relevance to the job.

Age can be a basis to disqualify a person from performing a licensed task but there must be a basis other than age alone. The key to a proper application of the equal protection clause in this case is the proof offered by both sides. The petitioner's expert carefully explained that the test discriminated on the basis of race and age without justification because of faulty design and validation. He made it clear that an expert would realize this or should realize it. We think the court should state that when it is obvious to qualified persons that a test eliminates applicants because of race and age without regard to a benefit or protection to the public, the use of such a test to eliminate people from their work results in a purposeful discrimination prohibited by the 5th and 14th Amendments to the Constitution of the United States.

This is a significant case because it deals with discrimination based on age and race which denies the right of the individual to continue in an occupation she has followed most of her adult life.

Respectfully submitted,



Richard F. Swope
THOMPSON, SWOPE, BURNS & BISWAS
6810 East Main Street
Reynoldsburg, Ohio 43068
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition For Writ Of Certiorari have been served on respondents, John H. Ackerman, M.D.,M.P.H., Director of Health, State of Ohio, and Ohio Department of Health, Board of Examiners of Nursing Home Administrators, by forwarding such copies through the office of their counsel, William J. McDonald, and Richard J. Forman, Assistant Attorneys General, State Office Tower, 30 East Broad Street, Columbus, Ohio 43215, on this 17th day of December, 1980. I further certify that all parties required to be served have been so served.

Richard F. Swope

Richard F. Swope,
Attorney for Petitioner

APPENDIX

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APPENDIX I

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO
City of Columbus

Annie M. Green,
Appellant and Cross-Appellee,

vs.

1980 TERM
To wit: July 24, 1980

John H. Ackerman,
Dir. of Health, et al.,
Appellees

No. 79-1574
REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ___, Page ___

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 24th day of July, 1980. THOMAS L. STARTZMAN, Clerk.

APPENDIX II

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, 1980 TERM
City of Columbus To wit: June 18, 1980

Annie M. Green,
Appellant and Cross-Appellee

vs. No. 79-1574

John H. Ackerman,
Director of Health, et al.,
Appellees and Cross Appellants

APPEAL AND CROSS-APPEAL FROM THE COURT OF APPEALS FOR FRANKLIN COUNTY.

This cause, here on appeal and cross-appeal from the Court of Appeals for Franklin County, was heard in the manner prescribed by law. On consideration thereof, the appeal and cross-appeal is hereby dismissed as having been improvidently allowed, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant costs herein expended; and that a mandate be sent to the COMMON PLEAS COURT to carry this judgment into execution; and that a copy of this

entry be certified to the Clerk of the Court of Appeals for FRANKLIN County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ___ day of _____, 1980.

_____Clerk

_____Deputy

APPENDIX III

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, City of Columbus — 1980 TERM To wit: February 8, 1980

Annie M. Green,
Appellee and Cross-Appellant

vs. No. 79-1574

John H. Ackerman, Dir., et al.,
Appellant and Cross-Appellee

MOTION/CROSS MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR FRANKLIN COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is allowed.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 8th day of February, 1980. Thomas L. Startzman, Clerk, Sam F. Adkins, Deputy.

APPENDIX IV

IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

Annie M. Green,
Plaintiff-Appellee

v. No. 79AP-236

John H. Ackerman, M.D., M.P.H.,
Director of Health,
State of Ohio,
Defendant-Appellant

Annie M. Green,
Plaintiff-Appellee

v. No. 79AP-237

Ohio Department of Health,
Board of Examiners of Nursing Home Administrators,
Defendant-Appellant

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on October 4, 1979, the Board of Examiners' assignments of error 2 and 4 are sustained,

and its assignments of error 1 and 3 are overruled, and the Director's assignment of error 1 is overruled, and his assignments of error 2 and 3 are overruled insofar as they relate to the reasonableness of the Director's revocation, and it is the judgment and order of this court that the judgment of the Franklin County Common Pleas Court is affirmed in part, reversed in part, and this cause is remanded to the trial court for further action in accordance with law and said decision.

STRAUSBAUGH, P.J.,
and REILLY, J.

By Judge Dean
Strausbaugh, P.J.

cc: Richard Swope
William J. McDonald

APPENDIX V

IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

Annie M. Green,
Plaintiff-Appellee

v. No. 79AP-236

John H. Ackerman, M.D., M.P.H.,
Director of Health, State of Ohio,
Defendant-Appellant

Department of Health,
Defendant-Appellee

Annie M. Green,
Plaintiff-Appellee,

v. No. 79AP-237

Ohio Department of Health,
Board of Examiners of Nursing
Home Administrators,
Defendant-Appellant

DECISION

Rendered on October 4, 1979

THOMPSON, SWOPE, BURNS & BISWAS,
MR. RICHARD SWOPE,
6810 East Main Street
Reynoldsburg, Ohio 43068
For Plaintiff-Appellee.

MR. WILLIAM J. BROWN, Attorney General,
MR. WILLIAM J. McDONALD, Assistant,
Administrative Agencies,
30 East Broad Street, Suite 1594
Columbus, Ohio 43215,
For Defendant-Appellant.

STRAUSBAUGH, P.J.

This case is a consolidation of two administrative appeals wherein Mrs. Annie Green challenges the validity of Chapter 4751 of the Ohio Revised Code which provides for the licensing of Nursing Home Administrators, and the revocation of her nursing home license for alleged violations of statutes and regulations pertaining to nursing homes.

Plaintiff is a black business woman over the age of 70 who has operated a small nursing home in Franklin County since May 13, 1947. In 1963, plaintiff was issued a license to maintain her nursing home at a capacity of 17 patients by the Director of Health for the state.

In January of 1966, plaintiff was sent a letter explaining that her state license was cancelled by operation of law and that the proper licensing authority was now the City of Columbus. This came about as a result of the City of Columbus having adopted its own standards for nursing homes and the shift in responsibility for licensing being accomplished under the provisions of R.C. 3721.09. The licensing authority for plaintiff's nursing home from 1966 through 1970 was the City of Columbus, and the license issued to Mrs. Green in 1963 was no longer in effect.

In 1971, Plaintiff applied for a new state license and was issued one which permitted a maximum capacity of only 14 patients, (a decrease from the former license by three patients). This was due to an increase in the minimum floor space required per patient under state regulations.

In April of 1970, the Ohio legislature enacted Chapter 4751 of the Ohio Revised Code, which provided for the licensing of nursing home administrators. To assist those who were already practicing administrators, former R.C. 4751.02 provided for provisional licensing until the administrator complied with the full

licensing requirements. Plaintiff applied for and was issued such a provisional license, which stated that it expired on June 30, 1972.

To assist practicing nursing home administrators in preparing for the examination, a "core of knowledge" course was offered through Ohio State University. This course was designed to supplement the practical knowledge already acquired by provisional licensees, and to help them become familiar with the test format and develop test taking skills by completing practice exams. Plaintiff did not take one of these courses.

In April of 1972, plaintiff applied for permission to take the examination for permanent license and took the exam on May 18, 1972. Plaintiff did not pass the exam and was informed by letter dated August 22, 1972, that if satisfactory response to the Board of Examiners inquiries as to who was the licensed administrator of Mrs. Green's home was not received by September 6, 1972, the Board possessed the authority under R.C. 4751.99 to turn the matter over to the prosecuting attorney for legal action. No response having been forthcoming, a criminal action was filed in Franklin County Municipal Court in December of 1972.

Mrs. Green then requested an administrative hearing on the matter, which was held on February 16, 1973, but the requested interpretation of the statute was denied. However, because of a technical error in the wording of the order, this court reversed the Board's order in unreported case number 76AP-825.

Plaintiff requested a re-hearing on remand. The request was denied and the Board simply corrected the previous error in their original order and filed the corrected order on November 22, 1977. Plaintiff filed a notice of appeal from this order with the Common Pleas Court.

The other administrative appeal before us in this consolidated case began with a letter sent by the Director of the Ohio Department of Health in July of 1975, which informed Mrs. Green of his intention to revoke her license to operate a nursing home due to seven violations of the Ohio Revised Code and the Ohio Sanitary Code. As a result of the hearing requested by Mrs. Green, held on June 2, 1976, the Director issued an adjudication order revoking Mrs. Green's license, based on findings that she was operating her nursing home without a licensed administrator and in excess of her maximum permitted capacity. The Director was aware of the pendency of plaintiff's appeal with regard to the administrator issue.

The two separate appeals, one from the order of the Board of Examiners and one from the Director of the Health Department, were consolidated in the Court of Common Pleas. The court sustained motions to introduce new evidence in support of the claims made in both appeals and held hearings on October 13, 1978, and December 12, 1978, of which complete transcripts were made and are part of the record before us.

The Common Pleas Court rendered its decision on December 28, 1978, and found that the examination given Mrs. Green was discriminatory with regard to age and race, thereby reversing the order of the Board of Examiners, and found that the order of the Director of Health was unreasonable and therefore reversed it as well. It is from this decision that the Board of Examiners and the Department of Health appeal.

The first assignment of error brought by the Board of Examiners of Nursing Home Administrators states:

> "The Court of Common Pleas erred in overruling the Board's motion to dismiss for Green's failure to exhaust her administrative remedy."

As stated in the Board's brief, "Green's adequate administrative remedy was to retake the examination." The Board maintains that Mrs. Green must have taken the examination some number of times before challenging its validity, and cites the case of Davison v. Bureau of Motor Vehicles (1975), 46 Ohio App. 2d 86, in support of the proposition. In Davison, however, the plaintiff had not taken the examination at all, and the case is therefore distinguishable. Plaintiff had to take the test, and did. Repetition was not necessary prior to her challenge to the validity of the test as applied to her. Accordingly, the first assignment of error is overruled.

The Board's second assignment of error states:

> "The Court of Common Pleas erred in finding that the test administered to Annie Green discriminates on the basis of race or age."

In finding that the examination was invidiously discriminatory, the Court of Common Pleas relied heavily on the testimony of Dr. JeD-Costa. Dr. JeD-Costa testified that it was his experience that minority black students at the undergraduate level do not have "sufficient background and training in taking tests and tend to do very poorly as a result of this * * *."

Based on Dr. JeD-Costa's experience with black undergraduate students, it was his opinion "that the test may not be an appropriate measure of the competence of this woman, given her age and educational background and racial background." (Tr-48.) With regard to both age and race discrimination, Dr. JeD-Costa stated:

> "A. I do believe given the age of the applicant, 69, and the fact that at that age one would be totally adverse to the kind of exercise that such a test requires of an experienced elderly person. This would be repugnant to her, almost, and might almost put her into a mental frame that would not want or facilitate responding to

a test like this. I honestly believe that there are other criteria in evidence that should be more prominently brought into play in the case of this particular applicant.

"Q. Doctor, will you outline to the Court what kinds of things that should be done to protect against the discrimination based on a person's race?

"A. I believe that the races involved have additional practice on handling of such tests. That would be voluntary and I believe that there is more than race in this particular case. It is also a fact educational background and age is interplaying and creating more serious problems than ever existed by race alone."

Dr. JeD-Costa did not testify that any particular question or questions on the exam were somehow discriminatory, nor did he present any statistical evidence tending to show a disproportionate impact on minority examinees on the exam in question. In fact, he stated that he was satisfied that the questions were job related.

Dr. JeD-Costa's testimony provided some evidence of the alleged discriminatory impact of the examination on Annie Green based on her race and age. However, Dr. JeD-Costa's testimony is to the effect that mult-

iple choice test-taking, irrespective of the subject matter tested, is an acquired skill in and of itself and in his opinion persons who lack experience and training in test-taking are under a disability. This includes blacks and the elderly. He also believed that an experienced elderly person would probably resent having to take a test to prove they were qualified to do their job. At different stages of the testimony, he characterized the extent to which this affects the test results as ranging from merely casting some doubt on the appropriateness of the test, to answering in the affirmative when asked by the trial court if, "The only way she could have passed the test is if they would take into consideration an oral examination * * *."

Presuming that Dr. JeD-Costa's expert testimony constitutes sufficient evidence to prove a disproportionate discriminatory impact upon black and elderly examinees, we do not find sufficient evidence in the record to justify the trial court's finding of purposeful discrimination. As stated by the majority in Washington v. Davis (1976), 426 U.S. 229:

> "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, McLaughlin v. Florida, 379 U.S. 184, 85 S. Ct. 283, 13 L.Ed. 2d 222 (1964), that racial classifications are to be subjected to the strict-

> est scrutiny and are justifiable only by the weightiest of considerations."

The only evidence in the record which could reasonably lead to an inference of discriminatory purpose as to either racial minorities or the elderly is the opinion testimony of Dr. JeD-Costa with regard to disproportionate impact. The trial court, using the language of a concurring opinion in the Washington case, found this sufficient to prove both discriminatory impact and purpose. We have doubts as to the sufficiency of the evidence with regard to impact, but the trial court's finding as to purpose was clearly in error. Under the law as set forth in the majority opinion in Washington, the record in this case does not contain sufficient evidence to support a finding of purposeful discrimination since the only evidence is the alleged disproportionate impact. Therefore, the plaintiff has failed, as a matter of law, to carry the burden of proof with regard to alleged invidious discrimination. The Board's second assignment of error is sustained.

The Board's third assignment of error states:

> "The Court of Common Pleas erred in allowing Green to present alleged 'additional evidence' regarding the validity or constitutionality of the test."

The Supreme Court stated in The East Ohio Gas Co. v. Utilities Commission of Ohio (1940), 137 Ohio St. 225:

> "* * * Constitutionality of statutes is a question for the courts and not for a board or commission."

Under this holding, Green's arguments relative to the constitutionality of Chapter 4751, the regulations adopted pursuant thereto, and the test as applied to her could not properly have been before the Board. The evidence presented, therefore, need not be "newly discovered," and the question of whether or not to admit this type of additional evidence is not subject to the "newly discovered" evidence provisions of R.C. 119.12, as we held in Foos v. Dept. of Agriculture (1978), unreported case No. 78AP-64 (1978 Decisions, page 2318). Accordingly, the taking of additional evidence in this case was within the discretion of the Common Pleas Court, and the third assignment of error is therefore overruled.

The Board's fourth and final assignment of error states:

> "The Court of Common Pleas erred in finding that the law and regulations as applied to Annie Green were unlawful and unconstitutional."

After carefully examining both the decision of the trial court and the judgment entry, it is clear that the court's phrase "the regulations and law as applied to Annie Green were unlawful and unconstitutional" refers to the allegedly discriminatory test. Having found, in the second assignment of error, that the test was not invidiously discriminatory, we are inclined to sustain the assigment of error. However, several arguments are raised by counsel for Green which we shall address to the extent that they involved matters of law.

Because the Court of Common Pleas found the test given to Annie Green to be unconstitutionally discriminatory, the court did not speak to the constitutionality of the statute, whether the regulation complies with the statute, and whether the licensing procedure as a whole complies with the regulations. Counsel for Green asserts that the licensing of nursing home administrators in any manner is unconstitutional as it has no relationship whatsoever with the public health, welfare or safety. We cannot agree.

In recent years, the conditions existing in nursing home facilities in Ohio and throughout the country have become a major concern. Although we are sympathetic with plaintiff, we find neither unreasonable nor unlawful the position of appellants that the person ultimately in charge of the nursing home is the administrator, and that the administrator should have some minimal knowledge of all the functions performed at the home in order to make the ultimate decisions on staffing and

facilities. Under these circumstances, we cannot say there is no relationship between the state's desire to assure the minimal competence of these administrators and the public health, safety and welfare.

The statute is also attacked as being so vague as to constitute an unconstitutional delegation of authority to the Board of Examiners. R.C. 4751.04, entitled "Powers and duties" states, in part:

> "(A) The board of examiners of nursing home administrators shall:
>
> "(1) Develop, adopt, impose, and enforce regulations prescribing standards which must be met by individuals in order to receive a license as a nursing home administrator, which standards shall be designed to insure that nursing home administrators are of good character and are otherwise suitable, and who, by training and experience, are qualified to serve as nursing home administrators;
>
> "(2) Develop and apply appropriate techniques, including examinations and investigations, for determining whether an individual meets such standards;"

R.C. 4751.05, entitled "Requirements for examination and license" states, in part:

"(A) The board of examiners of nursing home administrators shall admit to examination for licensure as a nursing home administrator any candidate who:

"(1) Pays the fee of fifty dollars;

"(2) Submits evidence of good moral character and suitability;

"(3) Is at least eighteen years of age;

"(4) Has completed educational requirements and work experience satisfactory to the board."

Under these two statutory provisions, the legislature has set sufficient criteria and standards to guide the Board of Examiners, and the statute is not an unconstitutional delegation of authority under the law as set forth in Matz v. Curtis Cartage Co. (1937), 132 Ohio St. 271. The Board is charged with the responsibility of developing examinations and investigations that will permit the Board to consider the suitability, character, training and experience of prospective licensed nursing home administrators.

Chapter 4751 does not contain a so-called "grandfather" clause which would exempt presently practicing nursing home administrators from some or all of the licensing requirements, though experience is one of the

factors to be considered by the Board of Examiners. Nor does the Chapter differentiate between an administrator's license for a two hundred patient nursing home versus a fourteen patient home. Such decisions, however, are within the legislative sphere and may not be altered by this court no matter how compelling the individual circumstances.

The record in this appeal indicates that Mrs. Annie Green has done an excellent job of administering her small nursing home for many many years. Of recent years she has suffered from increased governmental regulation. The concern of the legislature in protecting the elderly who are being cared for in nursing homes is well founded. Whether laws could have been written so as to protect the elderly without placing so great a burden on successful, long-term operators of small nursing homes such as Annie Green is a point for academic debate, but cannot form the legal basis for this court to declare the statute in question unconstitutional.

The regulations promulgated pursuant to R.C. 4751.04 were originally contained in NH-1-01 through NH-1-11 and can now be found in Chapter 4751-1 of the Administrative Code. The applicable regulations in force at the time of the original hearing in this case were as follows:

"NH-1-05. Pre-examination requirements; conditions precedent.

"(A) The board shall admit to examination for licensure as a nursing home administrator any candidate who:

"(1) Pays the fee of fifty dollars;

"(2) Submits evidence, on forms prescribed by the board, of good moral character and suitability;

"(3) Is at least twenty-one years old;

"(4) Is a citizen of the United States;

"(5) Meets at least one of the requirements of division (B) of this regulation.

"(B) In addition to the pre-examination requirements of division (A) of this regulation the board shall admit to examination for licensure as a nursing home administrator any candidate who:

"(1) Has a master's degree in nursing home administration or hospital administration; or

"(2) Has a baccalaureate degree and served as a hospital administrator for two (2) or more of the five (5) years immediately preceding the

receipt of the application for examination for licensure; or

"(3) Has served as a nursing home administrator for two (2) years or more during the five (5) years immediately preceding the receipt of the application for examination for licensure; or

"(4) Has served as a nursing home administrator for five (5) years or more during the ten (10) years immediately preceding the receipt of the application for examination for licensure; or

"(5) Has a baccalaureate degree or higher degree and has successfully completed a six (6) month internship as a nursing home administrator-in-training under the supervision of a nursing home administrator licensed by examination; or

" (6) Has a high school diploma or secondary school equivalency and has successfully completed a twelve (12) month internship as a nursing home administrator-in-training under the supervision of a nursing home administrator licensed by examination. "

"NH-1-06. Subjects for examination.

"Every applicant for a license as a nursing home administrator, after meeting the requirements for qualification for examination as set forth in regulation NH-1-05, shall successfully pass a written, unassembled, or oral examination or a combination thereof which shall include, but need not be limited to, the following subjects:

"(A) Applicable standards of environmental health and safety;

"(B) Health and safety;

"(C) General administration;

"(D) Psychology of patient care;

"(E) Principles of medical care;

"(F) Personal and social care;

"(G) Therapeutic and supportive care and services in long-term care;

"(H) Departmental organization and management;

"(I) Community interrelationships."

Having examined the regulations and the statute under which they were promulgated, we find that the regulations comply with the criteria and standards set by the legislature and are geared toward examining and testing the suitability, character, training and experience of prospective licensed nursing home administrators. Accordingly, the regulations comply with the statutes.

Having found Chapter 4751 to be constitutional and the regulations to comply with the statute, we are left with the question of whether or not the procedures and devices used by the Board of Examiners comply with the regulations. Unlike the previous two issues, this question is not one of law alone but a mixed question of law and fact, requiring an analysis of the entire licensing process. Such an evaluation should be conducted at the Common Pleas Court level, with appropriate findings of fact and law.

Because the decision of the Common Pleas Court was based on the "discriminatory" nature of the test as to Annie Green, which we have overruled, the fourth assignment of error must be sustained. The case will be remanded with instructions to the Common Pleas Court to consider and decide the issue of whether or not the licensing procedures, as a whole, comply with the regulations and statutes.

The first assignment of error brought by the Department of Health states:

"The Court of Common Pleas erred in finding that the Director of Health was required to give Green a hearing in 1971."

The record indicates that Annie Green requested and was granted a hearing on the Department of Health's proposed revocation of her license to operate a nursing home on June 2, 1976. Prior to this hearing, Annie Green's nursing home was permitted to operate and she was in no way prejudiced by not having such a hearing in 1971. Under these circumstances, whether the finding that a hearing was required in 1971 was in error or not is immaterial since no prejudice to Annie Green resulted from the delay. Accordingly, the Department's first assignment of error is overruled.

The Department's second and third assignments of error state:

"II. The Court of Common Pleas erred in failing to find that the Director's order was based upon reliable, probative, and substantial evidence and was in accordance with law.

"III. The Court of Common Pleas erred in failing to find that Green did not employ a licensed nursing home administrator."

The adjudication order which revoked Annie Green's license to operate a nursing home was based on two violations. These were:

"(1) Maintaining three patients in excess of her authorized licensed capacity, in violation of regulation HE-17-05(G) of the Ohio Sanitary Code (now 3701-17-05(G) O.A.C.) and Section 3721.05(B) and Section 3721.99, Ohio Revised Code.

"(2) Failing to employ a licensed nursing home administrator, in violation of regulation HE-17-08(A) of the Ohio Sanitary Code (now 3701-17-08(A), O.A.C.) and in violation of Sections 4751.02(A) and (B), 4751.09(B), 3721.05(B), and 3721.99, Ohio Revised Code."

By striking down the test given to Annie Green as being unconstitutionally discriminatory, the Common Pleas Court eliminated one of the two violations. It was the opinion of the Common Pleas Court that the revocation of Annie Green's license based on the excess capacity violation alone was unreasonable. Under R.C. 3721.03, the Director had the power and discretion to issue orders to secure compliance with the various statutes and regulations, or he could revoke the license of the offending nursing home.

Our decision on preceding assignments of error reinstates the administrator violation as some evidence upon which the court could have found that the Director's revocation was reasonable. The issue raised by the second and third assignments of error relates to

whether the revocation order is reasonable under these circumstances, based on reliable, probative and substantial evidence, and in accordance with law. We agree with the Common Pleas Court that, under the peculiar circumstancess of Annie Green's case, outright revocation of the nursing home license was unreasonable and an abuse of discretion on the part of the Director of Health. Annie Green should have been issued a compliance order under this particular set of circumstances, thereby permitting her to reduce her nursing home occupancy and to obtain the services of a licensed administrator. We do not wish to suggest that such orders are mandatory prior to the revocation of a nursing home license. The failure to give such orders is an abuse of discretion only within the particular set of circumstances involved in this case. Each case must be judged on the specific facts involved, and an appellate court should reverse the discretionary decision of the administrative agency in only the most compelling of circumstances with regard to the decision to revoke instead of merely ordering compliance. We find, however, that the Director's action was unreasonable and therefore overruled the second and third assignments of error, insofar as they relate to the reasonableness of the Director's revocation.

Accordingly, the judgment of the Common Pleas Court is reversed in part, affirmed in part, and remanded for further action in accordance with law and this decision.

Affirmed in part; reversed in part; and remanded.

REILLY, J., concurs.
MOYER, J., dissents.

MOYER, J., dissenting.

I concur in the decision of the majority with respect to the four assignments of error raised by the Board of Examiners of Nursing Home Administrators and the first assignment of error raised by the Ohio Department of Health. The Department's third assignment of error should be sustained because of our holding that the trial court erred in finding that the examination administered to Annie Green and other applicants discriminated on the basis of race and age. It follows that she was required to be, or employ, a licensed nursing home administrator pursuant to R.C. 4751.02(A) and (B); and that the trial court erred in failing to find that she did not employ a licensed nursing home administrator.

The majority, in considering assignments of error 2 and 3 of the Department of Health, has found that the Department abused its discretion by revoking the license of Annie Green rather than issuing her a compliance order. While I agree with the desirability of

producing such an equitable result, I cannot agree that the record before us supports the conclusion of the majority. Indeed, it appears that the issuance of a compliance order by the Director would have been a vain act in light of the basis of Annie Green's appeal. She has not argued that she needed time in which to be reexamined, herself, or in which to hire an administrator. Rather, her appeal has been based upon the validity of the statutes and rules creating the position of Nursing Home Administrator and the examination process with which licensees in her position are required to comply. There is nothing in the record or in the arguments raised by Annie Green that would indicate that, if the Director has issued a compliance order, rather than a revocation order, her argument to this court would have been any different.

More importantly, the record contains probative and substantial evidence supporting the Department's adjudication order, and, as we have held herein, the underlying reasons for said order are not unlawful. R.C. 3721.03 places in the Director of Health the discretion to issue orders to secure compliance and/or to revoke the license of a nursing home operator. The Director did not abuse his discretion or act unlawfully by mailing to Annie Green, in 1971, a letter requesting her to advise the Department whether she complied with the new law requiring an administrator; and then holding an adjudication hearing to determine whether her license should be revoked when she did not indicate compliance.

While a more equitable resolution of this case would appear to be desirable, we are bound by the record before us and the law of Ohio. This case is an example of an individual who has been directly affected by the current intense concern regarding the care and treatment of residents of nursing homes, not only in Ohio, but throughout the country. It is clear that the recent requirement, that a licensed nursing home be under the supervision of an administrator, is one response to that concern. It is perhaps unfortunate that the operator of a small nursing home, with a much simpler operation than a larger nursing home, is required to comply with the same requirements that seem to be directed at the larger homes. A reading of the examination, which is administered to Annie Green and other applicants, supports such a conclusion. Finding no exceptions in the law, and no so-called grandfather clause, I believe the intention of the General Assembly is manifest. I would sustain the second and third assignments of error of the Ohio Department of Health.

APPENDIX VI

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

ANNIE GREEN,
Plaintiff-Appellant

v. Case No: 77CV-04-1664

OHIO DEPARTMENT OF HEALTH,
BOARD OF EXAMINERS OF
NURSING HOME ADMINISTRATORS,
Defendant-Appellee

and

ANNIE GREEN,
Plaintiff-Appellant

v. Case No. 77CV-11-4977

JOHN H. ACKERMAN, M.D.,.
Director of Health,
State of Ohio,
Defendant-Appellee

JUDGMENT ENTRY

This matter came on for hearing on the appeal of Annie Green from the order of the Director of Health proposing to revoke her license to operate a nursing home and on the order of the Nursing Home Administrators' licensing Board overruling her objection to the requirement that she be licensed as an administrator, adn the Court upon consideration of the record, the additional testimony and the argument of counsel finds that the order of the Director of Health revoking her license to operate a nursing home should be reversed and remanded, and further that the order of the Nursing Home Administrators' Licensing Board should be reversed in that the regulations and law as applied to Annie Green were unlawful and unconstitutional.

The Court overrules the motion by the Board of Examiners of Nursing Home Administrators to dismiss Case No. 77CV-11-4977 for failure to exhaust Appellant's administrative remedy.

The matter was further considered on Defendant-Appellees' motion to reconsider and the Court finds the motion should be overruled.

WHEREFORE, it is Ordered, Adjudged and Decreed that the Director of Health's order revoking Annie Green's license to operate the Christian Home for the Aged, located at 1454 Eastwood Avenue, Columbus, Ohio, in Case No. 77CV-04-1664, be reversed and remanded because revocation of the license on the basis

of capacity without a hearing is unreasonable, and an order reducing her capacity in 1971 should have been issued.

It is further Ordered that the order of the Nursing Home Administrators' Licensing Board overruling Annie Green's contention that she need not obtain a further license as an administrator, pursuant to the regulations and laws as applied by the Board in Case No. 77CV-11-4977, hereby is reversed and remanded because the test utilized by the Board discriminates against minorities and older applicants who are far removed from the formal education process and are prevented by age, antiquated and limited education, and psychological factors in acquiring and utilizing test taking skills to pass such an examination.

It is further Ordered that Defendant-Appellees' motion to reconsider is hereby overruled. The Director of Health shall pay the cost of this action.

JUDGE FRED SHOEMAKER

APPROVED:

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APPENDIX VII

COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

ANNIE GREEN,
Plaintiff-Appellant

vs. Case No. 77CV-04-1664

OHIO DEPARTMENT OF HEALTH,
BOARD OF EXAMINERS OF
NURSING HOME ADMINISTRATORS
Defendant-Appellee

ANNIE GREEN,
Plaintiff-Appellant

vs. Case No. 77CV-114977

JOHN H. ACKERMAN, M.D.,
Director of Health,
Defendant-Appellee

DECISION

Rendered this 28th day of December, 1978,
SHOEMAKER, J.

In July, 1975, the Director of Health notified the Appellant, (hereinafter Green) that he proposed to revoke her license to operate a nursing home due to seven violations of the Ohio Revised Code and Ohio Sanitary Code. A hearing was held on June 2, 1976 before a duly appointed hearing examiner. The hearing examiner dismissed five of the violations, but found that the following two were proven:

> (1) Maintaining three patients in excess of her authorized licensed capacity, in violation of regulation HE-17-05(G) of the Ohio Sanitary Code (now 3701-17-05(G) O.A.C.) and Section 3721.05(B) and Section 3721.99, Ohio Revised Code.
>
> (2) Failing to employ a licensed nursing home administrator, in violation of regulation HE-17-08(A) of the Ohio Sanitary Code (now 3701-17-08(A), O.A.C. and in violation of Sections 4751.02(A) and (B), 4751.09(B), 3721.05(B), and 3721.99, Ohio Revised Code.

After considering the hearing examiner's recommendations and Green's objections to them, the Director issued an adjudication order revoking her license on April 6, 1977. That order is the subject of this appeal in Case No. 77CV-04-1664. By Journal Entry filed March 15, 1978, Case No. 77CV-11-4977 was trans-

ferred from Judge Williams to Judge Shoemaker because the issue relating to the nursing home administrator's license is common to both actions, and the evidence introduced in both cases should be considered in both cases.

This court permitted Green to submit additional evidence and Appellees to rebut such testimony.

The record shows that Annie Green has operated and acted as administrator of a small nursing home in Columbus, Ohio since May 14, 1947. Originally her home was licensed to care for seventeen (17) patients. Annie Green is a black lady, aged 69 years, who has the benefit of a high school education which she obtained in Tennessee. She is an L.P.N.

After the passage of Chapter 4751, Revised Code, Green was notified that she must apply for a provisional license and pass an examination for nursing home administrator before July 30, 1972, or she would no longer be permitted to act as administrator of her own nursing home.

R.C. 4751.04(A)(1) at times pertinent to this case provided as follows:

> "(A) The board of examiners of nursing home administrators shall:
>
> (1) Develop, adopt, impose and enforce regulations prescribing standards which must be met by individuals in order to receive a license as a

> nursing home administrator, which standards shall be designed to insure that nursing home administrators are of good character and are otherwise suitable, and who, by training or experience, are qualified to serve as nursing home administrators;***"

As Judge Whiteside pointed out on the previous appeal, such regulations could contain an appropriate "grandfather" clause substituting years of prior experience for the written examination. However, this branch of the Court does not believe the Board ever gave this idea any consideration.

On May 18, 1972 Green took the test and was then notified that she failed because she did not obtain a predetermined passing grade of seventy-five (75) percent. The additional testimony now shows that a passing grade now would not be predetermined. Mrs. Green did not obtain any credits for her work experience or age.

Annie Green claims that the test utilized by the Board discriminates against minorities and older applicants who are far removed from the formal education process and are prevented by age, antiquated and limited education, and psychological factors in acquiring and utilizing test taking skills to pass such an examination. I agree.

I found that the expert witness for Annie Green, namely, Dr. JeD-Costa to be a most knowledgeable and

candid witness with outstanding expertise and worthy of belief. I agree with most of his testimony and opinions and do hereby quote with approval a part thereof:

> "...What I found to be very impressive also were the cautions that Professional Examination Service put in the announcement for the test. Where they very specifically say the written objective of the examination is expected to be useful and the State Boards which chose to administer it as one important part of the procedures for the candidate for licensing." (emp. supp.)

However, the Board used this written examination as the only test for all candidates.

Dr. DeD-Costa further testified, at page 49:

> "A. I have worked with minority black students at the Undergraduate College, your Honor, and it is my opinion that these students who are each at the college level have not sufficient background and training in taking tests and tend to do very poorly as a result of this; and I am talking about the select group of black students who are aspiring to medicine and are not the typical students who may be worse than the kind of student I dealt with. I believe that kind of testing is done in high school and it does not

> begin to reflect the complexity and difficulty of the tests that are used in licensing and administering testing, and for this reason I believe the minority black person would have a serious problem with a test of this caliber."

Dr. JeD-Costa maintained that an elderly black lady must be tested by types of questions which permit such a person to answer problems in an essay manner so she can state how problems are handled and solved.

He further testified at page 50:

> "A. I do believe given the age of the applicant, 69, and the fact that at that age one would be totally adverse to the kind of exercise that such a test requires of an experienced elderly person. This would be repugnant to her, almost, and might almost put her into a mental frame that would not want or facilitate responding to a test like this. I honestly believe that there are other criteria in evidence that should be more prominently brought into play in case of this particular applicant."

Dr. JeD-Costa stated the test had an adverse impact on such persons as Annie Green and there is no available criteria validation to justify the need of such test to guarantee better performance by the person passing the test.

The evidence demonstrates that the test discriminates against minorities and elderly applicants regardless of their long experience in the field.

In Washington v. Davis, 426 U.S. Reports 229, 48 L.Ed. 597, 96 S.Ct. 2040 (1976) Justice Stevens in a concurring opinion wrote:

> "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which frequently is the product of compromise, of collective decision making and of fixed motivation. It is unrealistic, on one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decision maker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted against it.
>
> My point in making this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as

bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume...."

Discriminatory impact has been clearly shown and discriminatory purpose will be concluded by applying the reasoning of Justice Stevens.

The record clearly shows that Annie Green maintained patients in excess of the capacity of her present license of fourteen (14). However, she contends that her capacity is in fact seventeen (17) patients because prior to 1971 she had a perpetual license issued by the Director of Health or his agent for seventeen (17) patients. Green insists that when the new regulations became effective in 1971, an order should have been issued reducing the capacity on the basis of the new regulation. She maintains then she could have contested the regulation and the application to her home. She further claims the Director acted unreasonably in revoking her license without permitting her to lower the number of patients in her nursing home.

These claims are in addition to her other assignments of error which include the claim that Chapter 4751, Ohio Revised Code, is unconstitutional in its application to her home. Furthermore, Appellant contends the statute granting the agency authority to promulgate rules and adopt examination has no standard and thus results in an unconstitutional delegation of authority to the agency, and other claims of reversible error.

Annie Green has operated her nursing home for many year (sic) and only recently expended in excess of Twenty Thousand Dollars ($20,000.00) for installation of a sprinkler system. A reduction of patients from seventeen (17) to fourteen (14) is a substantial reduction in her income and will make it very difficult for her to continue to operate. Her problems are very real and it is certainly true that small business operations are constantly being wiped out due to over regulation by governments.

This court cannot find that the requirement that each patient have so much living space is arbitrary or unreasonable based on the entire record, even though it may result in the loss of three patients and have a very substantial impact on appellant's ability to operate. The wisdom of applying such a regulation to a pre-existing nursing home, with a good record of past operation, may be suspect but this court has no right to substitute its judgment.

The Court cannot conclude that this action results in the taking of Green's business or property without due process of law in violation of the 5th and 14th Amendments of the Constitution of the United States. The cases cited by Green are so factually different that, in my best judgment, they are not determinative of the issues herein.

Section 3721.07, Revised Code, prior to 1971 read in part as follows:

> "When the director issues a license, the license shall remain in effect until revoked by the director or voided at the request of the applicant; provided there shall be annual renewal fee payable during the month of January of each calendar year.
>
> Any applicant who is denied a license may appeal in accordance with sections 119.01 to 119.13 of the Revised Code."

This Court agrees with Green that when the new regulations became effective in 1971 that an order should have been issued reducing her capacity on the basis of the new regulation because this was an adjudication affecting a right granted by the director and his agents. To revoke Annie Green's license without such a hearing on capacity is unreasonable.

Section 119.01(D) defines Adjudication as follows:

> "(D) 'Adjudication' means the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person, ..."

Section 119.06 states in part as follows:

> "No adjudication order shall be valid unless an opportunity for a hearing is afforded in accord-

ance with sections 119.01 to 119.13, inclusive, of the Revised Code...."

Therefore, this Court finds that based on the entire record, including the additional evidence, briefs and pleadings, and for the reasons set forth in this decision, said orders are not in accordance with law and, therefore, are REVERSED and remanded for further hearing.

REVERSED.

Counsel for Appellant shall prepare and file the proper Judgment Entry per court rule, with costs to Appellees.

FRED J. SHOEMAKER,
JUDGE

Appearances:
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Attorney for Appellant

William J. McDonald
Assistant Attorney General
Attorney for Appellees

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

Case No. 80-999

Annie Green,

Petitioners,

v.

Board of Examiners of
Nursing Home Administrators,

Respondents.

ON WRIT OF CERTIORARI FROM THE
COURT OF APPEALS FOR FRANKLIN COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1980

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Annie Green,

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ON WRIT OF CERTIORARI FROM THE
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

1. Petitioner alleges that because of her somewhat advanced age, she is entitled to strict judicial scrutiny of Respondent's action under the 5th and 14th Amendments to the United States Constitution. However, no distinction or classification exisited in this case. Furthermore, this Court has held that classifications based upon age are not entitled to the same treatment as those based on race or national origin. **Massachusetts Board of Retirement v. Murgia,** 427 U.S. 307 (1976).

2. Petitioner's claim that her Constitutional rights have been violated is based solely upon the testimony of one witness, who stated that the *type* of examination she had to take in order to obtain licensure as a nursing home administrator placed a burden upon her because of her race. This same witness

added that the test was job-related. This testimony, does not establish such a violation for there exists no illegality of purpose. **Washington v. Davis,** 426 U.S. 229 (1976); **Columbus Board of Education v. Pennick,** 443 U.S. 449 (1979).

3. Because of the nature of the examination in question – licensure of a nursing home administrator pursuant to state statute – the State of Ohio's interest in assuring that competent persons administer nursing homes outweighs Petitioner's claim that she qualifies for licensure without successful completion of the exam. **Goldfarb v. Virginia State Bar,** 421 U.S. 773 (1975). **Washington v. Davis,** 426 U.S. 229 (1976). State licensing examinations have withstood attacks upon their validity under Title VII of the Civil Rights Act of 1964 on the same grounds Petitioner alleges in this case. Since the burden upon Petitioners is greater when alleging a constitutional violation as opposed to claims arising out of Title VII, a claim that does not violate Title VII, as a matter of law, cannot violate the Constitution, as greater deference is given to the reasonable acts of administrative officers. **Woodard v. Virginia Board of Bar Examiners,** 420 F. Supp. 211 (E.D. Va., 1976), *aff'd,* 598 F.2d 1345 (4th Cir., 1979). **Washington v. Davis,** 426 U.S. 229 (1976). Contrary to Petitioner's claim, that Respondent should have taken steps to validate its test, the Constitution does not require validation of state licensing examinations. **Washington v. Davis,** 426 U.S. 229 (1976); **Woodard v. Virginia Board of Bar Examiners,** 420 F. Supp. 211 (E.D. Va., 1976), *aff'd,* 598 F.2d 1345 (4th Cir., 1979).

STATEMENT OF THE CASE

On March 12, 1970, the General Assembly of the State of Ohio enacted Chapter 4751 of the Revised Code.[1] This Chapter required for the first time that every nursing home in Ohio must be supervised by a licensed nursing home administrator.[2] An examination was required as a condition for licensure.[3] To

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1 Ohio amended Senate Bill No. 481, 133 Ohio Laws 1380.

2 Section 4751.02 of the Ohio Revised Code.

3 Section 4751.04(A)(2) of the Ohio Revised Code.

enable those persons operating nursing homes at that time to continue in operation pending the home's employment of a licensed administrator, provision was made for provisional licensing.[4] The duration of the provisional license was specifically tied to federal statute[5] under the terms of the state statute.[6] Accordingly, Petitioner, an elderly black female, administrator of the Christian Home for the Aged, located at 1454 Eastwood Avenue, Columbus, Ohio, applied for and received a provisional license from Respondent Board of Examiners of Nursing Home Administrators[7] on August 26, 1971. This license was issued to Petitioner on September 7, 1971. It stated in bold letters: "Provisional License - No. 421-P VOID AFTER June 30, 1972." A letter sent to Petitioner with the license informed her that she had to apply for and pass an examination to continue in business as a nursing home administrator after June 30, 1972.

On April 19, 1972, Petitioner applied for the examination for licensure as a nursing home administrator, and, on May 18, 1972, she took her test. BENHA informed her via letter that she failed to attain the legal passing grade on the examination. The results of Petitioner's examination were:

EXAMINATION QUESTIONS

	Total	Administration	Patient Care	Other Facts	Converted Grade
Maximum No.	150	58	57	32	–
No. You Answered Correctly	57	20	25	12	66

4 Sections 4751.06(B) and 4751.06(C) of the Ohio Revised Code, set forth at page 5 of Petitioner's Brief. References to Petitioner's Brief shall be designated "P".

5 Social Security Amendments of 1967, 81 Stat. 909(1968), 42 U.S.C. Section 1396g(d).

6 Section 4751.06(C) of the Ohio Revised Code. See P. 5.

7 Hereinafter referred to as "BENHA".

On June 30, 1972, Petitioner's provisional license expired by operation of law.[8] BENHA requested at this time that Petitioner inform them of the name of the licensed nursing home administrator for the Christian Home for the Aged. On July 26, 1972, she submitted a form, NOTICE OF EMPLOYMENT OF LICENSED AND REGISTERED NURSING HOME ADMINISTRATOR to BENHA, wherein she state that *she* was the licensed and registered administrator of this particular home.

BENHA informed Petitioner via letter dated August 18, 1972, that it had sent investigators to the Christian Home for the Aged to ascertain the identity of the licensed administrator under whose supervision the home was being operated. The letter further informed Petitioner that Ohio Law required a licensed administrator at the home,[9] that she could not engage in the practice of nursing home administration without a license,[10] and that her failure to comply with Ohio law would force BENHA to turn the matter over to her county prosecutor for criminal prosecution.[11]

In a letter to BENHA dated December 27, 1972, Petitioner finally requested a hearing before BENHA contending that her provisional license, under state statute, was still in effect. The hearing was held on February 16, 1973. At no time during this hearing did Petitioner in any way challenge the validity of the examination that she had failed.

On March 22, 1973, BENHA notified Appellant that it was moving to deny Petitioner's interpretation of Ohio law. This order was appealed to the Franklin County, Ohio, Court of Common Pleas[12] which sustained BENHA. The matter was appealed to the Franklin County, Ohio, Court of Appeals[13]

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8 See notes 5 and 6.

9 Section 4751.02(A) of the Ohio Revised Code.

10 Section 4751.02(B) of the Ohio Revised Code.

11 Section 4751.99 of the Ohio Revised Code.

12 Case No. 73CV-03-1104, unreported.

13 Case No. 76AP-825, unreported.

which reversed the Court of Common Pleas, holding that because BENHA had "moved" to deny Petitioner's interpretation of Ohio law, it's decision was not a final order and therefore the Court of Common Pleas was without jurisdiction to hear the appeal.[14] The Supreme Court of Ohio denied a Motion to Certify the Record on October 21, 1977, so the matter was remanded to BENHA.

On November 8, 1977, BENHA sent a second adjudication order to Petitioner, removing the ambiguity as to whether the Board denied Petitioner's requested interpretation or merely "moved" to do so. This order was appealed to the Court of Common Pleas for Franklin County.[15] At the same time, Petitioner was also appealing in the same Court[16] the order of Respondent, Dr. John H. Ackerman, Director of Health,[17] who had revoked her nursing home operator's license.[18] Because one of the bases for the Director's action was the failure of Petitioner to employ a licensed nursing home administrator at her facility, Petitioner moved to consolidate the two cases, which motion was granted.

At this stage of the proceedings Petitioner alleged for the first time that the licensure test she failed was discriminatory[19] and moved to be permitted to present additional evidence to support this claim.[20] This motion was granted, and on October 13, 1978, a hearing was held at which Petitioner produced a witness, Ayres G. Jed-Costa, a psycometrician employed by

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14 The Court of Appeals for Franklin County, Ohio, determined that the Court of Common Pleas was without jurisdiction to hear the appeal pursuant to Section 119.12 of the Ohio Revised Code.

15 Case No. 77CV-11-4977, unreported.

16 Case No. 77CV-04-1664, unreported.

17 Hereinafter referred to as "The Director".

18 See Section 3721.03 of the Ohio Revised Code.

19 In Petitioner's Reply Memorandum filed in Case No. 77CV-04-1664. Said Memorandum was dated March 21, 1978.

20 Under Section 119.12 of the Ohio Revised Code, parties to an administrative appeal may present additional evidence to the Common Pleas Court on the theory that it is "newly discovered".

Ohio State University, who testified that it was his opinion that passing the type of test employed by BENHA,[21] required a certain skill, in and of itself, and persons who lack experience and training in taking this type of test are under a disability. His conclusions were based on his experiences at the University.[22] Importantly, there was no testimony from Petitioner's expert that older persons as a distinct group or class were under any disability in taking this exam.

Petitioner offered no evidence that any person other than herself failed BENHA's examination. Dr. Jed-Costa performed no statistical analysis on this test of the failure rates of minorities compared to whites, nor of older persons as compared to younger ones. He also testified that the test was highly reliable and the questions it contained were job-related. BENHA also produced a witness, Dr. William Dowling, who testified that the examination was a job-related one rather than one of general intelligence, and that there was nothing in it which discriminated against a person on the basis of race or age. Obviously, Petitioner's opinion testimony has been completely rebutted by the actual facts of this case.

BENHA also presented the testimony of Nancy Lucas, who had been its Executive Secretary since March, 1971. She testified concerning the efforts made by BENHA to assist

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21 The test used by BENHA was a multiple choice examination preparted by the Professional Examination Service, (P.E.S.) 475 Riverside Drive, New York, New York. It contained questions on various topics relating to the operation of a nursing home, including patient care and administration of the facility. Petitioner correctly answered 38% of the questions and received a final score of "66".

22 See the decision from which Petitioner appeals Case No. 79AP-236, Court of Appeals, Franklin County, Ohio, found at P. A-7, particularly the discussion at P. A-13 – A-15.

provisional licensees in passing the licensure examination.[23] A course was made available in 1971 and 1972 at Ohio State University, free of charge, to all provisional licensees. It included practice exams and instructions on how to take the upcoming exam. The information taught in the course was the same information that was later covered in BENHA's exam. There was also a practice session before each exam. Provisional licensees were permitted to take the examination an unlimited number of times if need be to pass it.

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23 Section 4751.06(F) of the Ohio Revised Code at the time Petitioner took BENHA's examination provided:

> If the board issues a provisional license to any individual under this section, the Ohio Department of Public Welfare or any agency of the state government with which it contracts shall provide in the state during all of the period for which such provisional license remains in effect a program of training and instruction designed to enable all provisional nursing home administrators to attain the qualifications necessary for licensure as a nursing home administrator. For the purposes of this division, the Ohio Department of Public Welfare may receive and disburse federal funds received pursuant to the social security amendments of 1967, 81 Stat. 909 (1968), No. 42 U.S.C. 1396g(e).

Regulation NH-1-08 of BENHA provided:

Program of training and instruction.

> To provide a basis for future licensure reciprocity between this state and other states, and to provide that the content of programs of training and instruction contains sufficient amounts of appropriate information relating to the proper and efficient administration of nursing homes, *the detailed guideline categorization of the basic areas of the core of knowledge as set forth in section 252.44(i) of Part 242, Title 45,* as published in volume 25, no. 41 Part II of the Federal Register dated Saturday, February 28, 1980, *are hereby prescribed by the board for the approval of grants to Ohio for training and instruction programs for provisionally licensed nursing home administrators.* (Emphasis added).

The above-referenced section of the Code of Federal Regulations provided for a program of:

> . . . training and instruction *to enable all individuals who have been granted provisional licenses* under section 252.40(d) of this part *to attain the minimum qualifications necessary* to meet the State standards for licensure as nursing home administrators. 45 C.F.R. Section 252.44(a). (Emphasis added).

On April 5, 1979, the Court of Common Pleas filed Judgment against BENHA, holding that Green need not obtain a nursing home administrator's license because BENHA, through its examination, purposely discriminated against minorities and older applicants who were far removed from the formal education process.[24]

BENHA and the Director appealed this determination to the Franklin County Court of Appeals. In a decision rendered on October 4, 1979, the Court of Appeals reversed on the issue of discrimination, finding that Dr. Jed-Costa's testimony did not support the Court of Common Pleas conclusion that BENHA had engaged in purposeful discrimination.[25]

Petitioner filed a Motion to Certify the record with the Ohio Supreme Court in both cases, which was granted on February 8, 1980. Oral argument was presented on May 21, 1980. The Supreme Court of Ohio issued an order on June 18, 1980, which dismissed both appeals as being improvidently allowed. A motion for rehearing to the same Court was denied on July 24, 1980.

ARGUMENT

RESPONDENT BOARD OF EXAMINERS OF NURSING HOME ADMINISTRATORS DID NOT VIOLATE THE CONSTITUTIONAL RIGHTS OF PETITIONER WHEN IT REQUIRED HER TO PASS AN EXAMINATION FOR LICENSURE AS A NURSING HOME ADMINISTRATOR PURSUANT TO STATE LAW.

Petitioner operated her nursing home, the Christian Home for the Aged under the auspices of a provisional nursing home

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24 This decision is found at P. A-36. Under Section 119.12 of the Ohio Revised Code, the Court of Common Pleas is to affirm an order of an administrative agency if it finds "that such order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modity the order(.)"

25 Case No. 79AP-236, unreported. The decision is found at P. A-7.

administrator's license from September 7, 1971, to June 30, 1972, when it expired by operation of law.[26] In order to remain licensed after June 30, 1972, it was necessary for Petitioner to take and pass a nursing home administrator's licensing exam given by BENHA. Petitioner took the exam on May 18, 1972, and failed to pass it. She is now arguing that her rights assured under the Fifth and Fourteenth Amendments to the United States Constitution have been violated because BENHA "knew or should have known that the examination would discriminate against older black persons."[27]

Petitioner contends that her age is a factor worthy of special scrutiny, stating that "(a)ge is an area clearly protected by the equal protection clause of the United States which should be clearly encompassed in the same classification and category as sex and race."[28] This Court has expressly addressed this issue and concluded to the contrary in **Massachusetts Board of Retirement v. Murgia.**[29] In discussing a statute which placed state policemen on mandatory retirement when they reach age 50,[30] this Court stated,

> While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.
>
> . . .(O)ld age does not define a "discrete and insular group". . .in need of "extraordinary protection from the majoritarian

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26 See notes 5 and 6.

27 P. 12.

28 P. 13.

29 427 U.S. 307 (1976).

30 Mass. Gen. Laws Ann. C 32, Section 26(3)(a) (1969).

> political process." . . . Even if the statute could be said to impose a penalty upon a class defined as the aged, it would not impose a distinction sufficiently akin to those classifications that we have found suspect to call for strict judicial scrutiny.[31]

Because this Court does not subject the elderly as a class to strict scrutiny, Petitioner's claim must stand or fall on whether or not she was discriminated against because of her race.

There is no evidence in the record that anyone other than Petitioner failed to pass the licensure exam given by BENHA. Petitioner's witness, who testified that the type of test used, in his opinion, had an adverse impact on black persons, also stated that the examination was indeed job-related. Petitioner is basing her entire claim that her constitutional rights have been violated upon this one piece of evidence. Contrary to her claim in this Court, the Court of Appeals for Franklin County, Ohio, did not decide a matter unresolved by this Court.[32] The court below correctly decided Petitioner's case on well-settled principals of constitutional law.

In **Washington v. Davis,**[33] this court refused to find a constitutional violation arising out of the Washington, D.C. Metropolitan Police Department's use of "Test 21"[34] as a condition for a promotion. The plaintiffs argued that this test served to exclude a disproportionately high number of black applicants. While noting that discriminatory purpose need not

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31 **Massachusetts Board of Retirement v. Murgia,** 427 U.S. 307, 313-14 (1976).

32 P. 11.

33 426 U.S. 229 (1976).

34 Test 21 is "an examination that is used generally throughout the federal service. It. . . is designed to test verbal ability, vocabulary, reading and comprehension." **Davis v. Washington,** 348 F. Supp. 15 (D.C., 1972).

be express to trigger a constitutional violation, and that such a violation may "be inferred from the totality of the relevant facts,"[35] this Court also stated disproportionate impact is "not the sole touchstone of an invidous racial discrimination forbidden by the Constitution."[36] To find that a challenged practice violates the conttitution, this Court concluded that it must be shown to be a "purposeful device to discriminate."[37]

Later cases of this Court have reaffirmed this principal.[38] "'Discriminatory purpose', however, implies more than intent as violition or intent as awareness of consequences. . . It implies that the decision maker. . .selected or reaffirmed a particular course of action at least in part 'because of', not merely 'in spite of', its adverse effects upon an identifiable group."[39]

If BENHA had chosen to give this test to potential licensees "because of" its alleged desire to somehow discriminate against blacks and the elderly, it would not have gone to the effort of preparing a special course at Ohio State University to assist those about to take the exam. It would not have had a practice session prior to each exam nor would it have permitted those provisional licensees who failed the exam to take it as many times as need be in order to eventually pass. There is simply no concrete evidence in the record to indicate that this test was designed or administered with a purpose.

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35 **Washington v. Davis**, 426 U.S. 229, 242 (1976).

36 *Id.*

37 *Id.* at 246.

38 See **Village of Arlington Heights v. Metropolitan Housing Development Corp.**, 429 U.S. 252 (1977) and **Personnel Administrator of Massachusetts v. Feeney**, 442 U.S. 256 (1979).

39 **Personnel Administrator of Massachusetts v. Feeney**, 442 U.S. 256, 279 (1979). Citation and note omitted.

Petitioner's argument fails because it is based entirely upon her claim that BENHA "should have known" its test was discriminatory.[40] This she argues can be inferred from her witness' testimony about the adverse effects he believed this test would have on blacks. While the inevitability or foreseeability of consequences of a neutral rule may have some bearing upon the existence of discriminatory intent,[41] "in this inquiry — made as it is under the Constitution — an inference is a working tool, not a synonym for proof."[42] The only evidence of purpose Petitioner has is this inference of "foreseeability of consequences." Standing alone, it is not proof that BENHA has purposely violated the Constitution.[43]

There is another factor that undermines Petitioner's position, and that is the nature of the examination in question. This test was not a general intelligence test, or some other examination given by an employer to members of its work force as was the case in **Washington v. Davis.** This test is a state licensing examination. As an exercise of its police power,[44] for the protection of its citizens who reside in nursing facilities, the Ohio General Assembly chose to require the presence of a licensed administrator for all nursing homes located in the State.[45] To achieve licensure, one had to prove he was quali-

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40 At P. 14, Petitioner quotes from **Columbus Board of Education v. Pennick,** 443 U.S. 449 (1980), to support this claim. But the brief exerpt set forth at P. 14 does not fully dispose of an inquiry into an allegation that the Constitution has been violated. As this Court also noted, "disparate impact and foreseeable consequences, without more, do not establish a constitutional violation." 443 U.S. 464.

41 **Personnel Administrator of Massachusetts v. Feeney,** 442 U.S. 256, 279, note 25 (1979).

42 *Id.*

43 Petitioner also relies on **Richardson v. Pennsylvania Department of Health,** 561 F.2d 489 (3rd Cir., 1977) to support this claim. The exerpt quoted correctly states the law — that disproportionate impact *may* be *evidence* of illegal purpose. But evidence is not synonymous with proof. **Feeney,** 442 U.S. 256, 279, note 25 (1979).

44 See **Miami County v. Dayton** (1915), 92 Ohio St. 215, 223-4, 110 N.E. 726, 729.

45 Section 4751.02(A) of the Ohio Revised Code.

fied by passing an examination[46] that posed questions relative to the competent operation of a nursing home. There is no question that this test was job-related, as Petitioner's own witness so testified. BENHA submits that the State of Ohio's interest in providing quality care to residents in nursing homes by requiring licensees to pass a test relevant to that purpose outweighs Petitioner's claim that BENHA should have attempted to validate this test to prevent what she alleges is purposeful discrimination.[47]

In **Woodard v. Virginia Board of Bar Examiners,**[48] a challenge similar to Petitioner's was made against the Virginia Bar Examination under Title VII of the Civil Rights Act of 1964, as amended.[49] That Court found no violation of Title VII, noting the broader purpose served by professional licensing examinations as opposed to those tests given to employees as part of traditional employment practices.[50] In lieu of the more lenient standard of proof for Plaintiffs under a Title VII claim then for one brought directly under the Constitution,[51]

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46 Section 4751.04(A)(2) of the Ohio Revised Code and Section 4751-1-06 of the Ohio Administrative Code.

47 "(T)he states have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. **Goldfarb v. Virginia State Bar,** 421 U.S. 773, 792 (1975).

48 420 F. Supp. 211 (E.D. Va., 1976), *aff'd,* 598 F.2d 1345 (4th Cir., 1979).

49 42 U.S.C. Section 2000e *et seq.*

50 420 F. Supp. 211, 214.

51 "Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challeged practices. ... However this process proceeds, it involves a more probing judicial review of and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose is claimed. We are not disposed to adopt this more rigorous standard for the purposes of applying the Fifth and Fourteenth Amendments in cases such as this." **Washington v. Davis,** 426 U.S. 229, 246-8 (1976).

BENHA submits that if a state's interest in licensing examinations can withstand a claim of disproportionate racial impact under Title VII, then it readily passes muster under the Constitution.

The cases cited by Petitioner in her brief[52] supporting her claim that BENHA was required to validate its licensing examination are likewise Title VII cases, and not applicable when considering a constitutional violation, which requires proof of discriminatory purpose.[53] In addition, the evidence of disproportionate impact in those cases Petitioner cites was much greater than in the case at bar.[54] Petitioner contends that BENHA should have used "standard techniques" to validate its licensure test, but the Constitution mandates no such endeavor.[55] And Title VII, which BENHA concedes does require such validation of general employment tests, does not reach a state licensure exam.[56]

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52 P. 15.

53 A fact which all three of these cases pointed out. **Vanguard Justice Society v. Hughes,** 471 F. Supp. 670, 701 (Md., 1979); **Scott v. City of Anniston, Alabama,** 597 F.2d 897, 899 (5th Cir., 1979); **Blake v. City of Los Angeles,** 595 F.2d 1367, 1378 (9th Cir., 1979).

54 In **Blake v. City of Los Angeles,** 595 F.2d 1367 (9th Cir., 1979) a municipal police regulation operated to totally exclude women from regular patrol work. In **Scott v. City of Anniston, Alabama,** 597 F.2d 897 (5th Cir., 1979), the Defendant City's Department of Public Works was departmentalized into 26 different positions. Black employees were found in only the three largest classifications, where the least degree of skill was required and the greatest number of employees was concentrated. In **Vanguard Justic Society v. Hughes,** 471 F. Supp. 670 (Md., 1979), use of an entry level test by the Baltimore police department produced a black pass rate only 66% of the white rate for the years 1973-76.

55 "A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory and licensing statutes (.)...

"Given that rule, such consequences would perhaps be likely to follow. However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute. . .should await legislative prescription." **Washington v. Davis,** 426 U.S. 229, 248 (1976). See also notes 47 and 48.

56 See **Woodard v. Virginia Board of Bar Examiners,** 420 F. Supp. 211 (E.D. Va., 1976), *aff'd* 598 F. 2d 1345 (4th Cir., 1979) and the cases cited therein.

CONCLUSION

Based upon the foregoing, Respondent Board of Examiners of Nursing Home Administrators respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was sent by regular U.S. Mail to Mr. Richard F. Swope, 6810 East Main Street, Reynoldsburg, Ohio 43068 on this _____ day of February, 1980.

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